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Supreme Court of the United States

October Term, 1950 — No. 538

SUNBEAM CORPORATION, a Corporation,
Petitioner

vs.

S. A. WENTLING,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and the Associated Justices of the Supreme Court of the United States:

S. A. Wentling urges that the petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Third Circuit vacating a decree of the District Court of the United States for the Middle District of Pennsylvania be denied.

I.

COUNTER-STATEMENT OF THE MATTER INVOLVED

Respondent is an individual who for a number of years has made his living by retail sales, to consumers located in all of the states and in foreign countries, of a number of lines of products, which, up to the time this suit was instituted, included petitioner's merchandise. As a part of this business he placed advertisements, in a number of sports magazines which circulate throughout the entire country, in all of the states, and in foreign countries. Respondent conducted this business through the mails from an upstairs bedroom in

his home in the Borough of Palmyra, Lebanon County, Pennsylvania.

Customers from all over the country and foreign countries would send orders to him by mail. He sent the goods to them by mail, paying the cost of transportation and of insurance, and guaranteeing to each customer that if upon arrival, and inspection, the customer was not satisfied for any reason or no reason, the goods could be returned.

On May 5, 1949, the Sunbeam Corporation, after several threats to Respondent, commenced the instant suit in the United States District Court, Middle District of Pennsylvania, by filing there a Complaint in Equity, based upon the so-called "Fair Trade Act" of Pennsylvania, which in substance legalizes a contract or contracts between a manufacturer and one or more retailers in Pennsylvania fixing the minimum price at which the retailer may sell the manufacturer's product. The "non-signer" section of this Act then fastens the price thus fixed by the contract or contracts on all other retailers in the state who have knowledge of such contract.

The pertinent portions of this Act of 1935, June 5, P.L. 266, as amended June 12, 1941, P.L. 128 (73 PS 7 and 8) are set forth in Appendix D to Petitioner's Brief.

The above Pennsylvania "Fair Trade Act" should be read in connection with Section 1 of the Sherman Act, as amended by the addition of two proviso clauses known as the "Miller-Tydings Amendment" (July 2, 1890, C. 647, § 1, 26 Stat. 209; Aug. 17, 1937, C. 690,

Title VIII, 50 Stat. 693, 15 U.S.C.A. 1). This Section is set forth as Appendix C to Petitioner's Brief.

Petitioner-manufacturer attached to its Complaint contracts with four retailers in Pennsylvania whereby they agreed to sell Petitioner's model "S" Shavemaster at not less than $23.50. Petitioner complained that Respondent had advertised a lower price in a number of sports magazines circulating in all the states and in foreign countries.

Since Respondent had never entered into any such price-fixing contract with Petitioner, Petitioner claimed that Respondent had violated the "non-signer" section of the Pennsylvania Act quoted above, because Respondent had knowledge of the prices fixed in the contracts with the four retailers.

Petitioner prayed for a sweeping injunction under the Pennsylvania Act above against all advertising by Respondent of his lower price, and against all sales by Respondent at a lower price, without regard to whether the sales were made in Pennsylvania or any other state or foreign country; and whether the advertisement circulated entirely or predominantly within the other states or foreign countries.

In his answer, as amended, Respondent resisted an injunction, inter alia, on the grounds that neither Plaintiff's contract nor the Pennsylvania statute applied to his advertisements and sales transacted in other states and in foreign countries.

Petitioner moved for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure.

Argument was heard by District Judge Frederick V. Follmer in Harrisburg, Pennsylvania, on October 14, 1949.

Judge Follmer handed down his order granting the sweeping injunction prayed for by Petitioner, and from that order, Respondent appealed to the United States Court of Appeals for the Third Circuit.

The Court of Appeals entered an order vacating the decree of the District Court **insofar as it pertained to interstate sales,** and later refused Petitioner's request for reargument.

II.

RESPONDENT'S VIEWS CONCERNING QUESTIONS PRESENTED BY PETITIONER

---

1. There is no conflict between the holding in this case and the ruling of the Fifth Circuit in **Schwegmann Bros. v. Calvert,** 184 F. (2d) 11. In that case the defendants, Schwegmann Brothers, contended:

(1) That the so-called price-maintenance contracts on which enforcement of the Fair Trade Law against the non-signing defendants is based, are null and void under the laws of Louisiana for want of mutuality or because of potestativity; and (2) that the scope of the resale price-maintenance permitted by the Miller-Tydings Amendment does not extend to non-contracting retailers. The facts in the case were that all of defendants' resales were wholly intrastate, and defendants, not having signed a fair trade agreement, challenged the validity of the non-signer provisions of the Louisiana Fair Trade Act. The ruling in that case is wholly consistent with that of the Third Circuit which held that the Respondent, although a non-signer, is bound by Petitioner's Fair Trade contracts so far as intrastate re-sales are concerned, but that the Pennsylvania Statute is not permitted to govern Respondent's subsequent interstate sales.

2. The Circuit Court has **not** failed to give effect to the Miller-Tydings Amendment. The purpose of

Miller-Tydings was to remove contracts between manufacturers in one state and retailers in another state from the realm of the Sherman Act when goods moved interstate from the manufacturer to the retailer for intrastate resale. Certainly the Circuit Court's opinion does not interfere with the operation of the Amendment in this respect.

3. The District Court was **not** right in its ruling, as stated in the question, for the applicable reasons stated in the Circuit Court's opinion wherein it construed the Pennsylvania Act as not applying to sales by Pennsylvania retailers to consumers in other states.

4. The Circuit Court did **not** err in construing the Pennsylvania Fair Trade Act as not applying to sales by Pennsylvania retailers to consumers in other states for the reasons set forth in Judge Goodrich's opinion. Petitioner uses of the word "price-cutting", connoting an unethical business practice, but its question could just as well have been worded: "if construed to permit enjoining interstate sales at reasonable prices rather than at artifically pegged prices by individuals operating from headquarters in Pennsylvania."

5. No. Petitioner indulges in a contradiction by saying that the Sherman Act and the Miller-Tydings amendment were regulatory of commerce, but that the state statutes, declaring fair trade contracts to be legal, are not regulatory. If one is regulation, so is the other. Both the Acts of Congress and the state statute permit the doing, within a limited sphere, of that which was formerly condemned by statute.

6. The Circuit Court did not construe Miller-Tydings as having "purely intrastate effect", and did not interfere in any way with its applicability to contracts between manufacturers in one state and retailers in another, as stated in our comment to question 2 above.

7 and 8. The Circuit Court did not repeal a "legislated merchandising policy"; on the contrary it merely restricted to applicability of the Pennsylvania Fair Trade Act to the purpose for which it was passed. Petitioner loses sight of the purpose behind this legislation, fuller reference to which is made in our argument which follows.

III.

RESPONDENT'S COMMENTS ON PETITIONER'S REASONS FOR GRANTING THE WRIT

---

1. It is denied that the decison below is in direct conflict with **Schwegmann Bros. v. Calvert Distillers,** 184 F. (2d) 11 (1950), for the reasons stated in our comment to question 1 above.

2. The decision below will have no effect whatsoever on, and certainly will not nullify, the fair trade Act of any state or the Miller-Tydings Amendment. For years, manufacturers have carried on their businesses satisfactorily under the state acts, and, apparently, other manufacturers knew, or should have known, that the several state statutes have no applicability to interstate resales. In 2CCH Trade Reg. Ser. 7117, the opinion has been expressed for years:

> "Non-contracting dealers not being under a contractual liability, are forced to maintain established prices only if they are subject to state statutory prohibitions. **It seems that interstate sales should not be held subject to the prohibitions of any state law."** (Boldface ours)

3. Petitioner's position is untenable. The Circuit Court held that the proper construction of the Pennsylvania Fair Trade Act was to limit its applicability to intrastate resales. The Court did not declare

the Act unconstitutional, but interpreted the language of the Act in the light of constitutional barriers to the construction contended for by Petitioner. Furthermore, the effectiveness of the Pennsylvania statute has not been denied; it remains effective as in the past to enforce price-fixing contracts with respect to intrastate resales.

4. The Circuit Court did not "frustrate" an Act of Congress. Again, Petitioner has failed to recognize the congressional intent behind the Miller-Tydings Amendment, as has been set forth above. The frustration of Petitioner's desire to torture the Amendment to mean that which was never intended cannot be the basis for an application to this Court.

IV.

ARGUMENT

A.

(Respondent herein sets forth a portion of his argument presented to the United States Court for Appeals for the Third Circuit.)

Neither Petitioner's Contract nor the Pennsylvania Statute Apply to Respondent's Transactions in Interstate and Foreign Commerce.

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1. Petitioner's contract is confined to Pennsylvania sales.

Outside of the Boston Sunday Advertiser, circulating chiefly around Boston, Massachusetts, Respondent's advertisements, including those Petitioner complains of, have been carried exclusively in sports magazines which circulate throughout all the states, in the possessions, and in foreign countries. Not one of these periodicals is printed or published in Pennsylvania. The circulation of his advertisements as part of these periodicals is thus in interstate and foreign commerce. **Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.**, 293 U.S. 268, 55 S. Ct. 182, 184; **International**

Text Book Co. v. Pigg, 217 U.S. 91, 30 S. Ct. 481; **Pensacola Tel. Co. v. West, Etc., Tel. Co.,** 96 U.S. 1, 9, 10. And so are the communications relating to sales passing between him and customers in other states and foreign countries. **International Text Book Co. v. Pigg** (supra); **Butler Bros. Shoe Co. v. United States Rubber Co.,** 84 C.C.A. 167, 183, 156 Fed. 1, 17; **Rottschaeffer on Constitutional Law,** 231, 235.

The actual shipment of goods from Pennsylvania into other states contemplated by the respondent and the customers in other states in all of the above interstate communications is, of course, under the earliest definitions of that term interstate commerce. 11 Am. Jr. § 4, **Rottschaeffer** (supra) 231. And since the parties from the outstart of negotiations contemplate the shipment across state or national boundaries, the entire transaction becomes one in interstate or foreign commerce. **Rottschaeffer** (supra) at page 235 states:

> "The decisive factor that renders making a contract an act of interstate commerce is that it contemplates or necessarily involves the movement of goods in interstate commerce and this test applies whether it be a contract to buy or one to sell."
>
> (citing **Dahnke-Walker Milling Co. v. Bandurant,** 257 U.S. 28, 42 S. Ct. 106 **Crenshaw v. State of Arkansas,** 227 U.S.389, 33 S. Ct. 294.)

The form contract exhibited in petitioner's complaint is entitled "Retail Sales Contract Covering Products of Sunbeam Corporation (Address) **Under**

Pennsylvania Fair Trade Act." The first paragraph recites: "Whereas, Producer is **engaged in the sale and distribution in Pennsylvania** of various commodities (etc.)." The third paragraph states: "Whereas, the Producer is the manufacturer and owner of said commodities covered by the terms of this agreement and **offered for sale within the State of Pennsylvania; and Retailer is engaged in the retail sale and distribution of said commodities within the said State**; and" Paragraph four: "Whereas the Producer and Retailer mutually **desire to avail themselves of the provisions and protection of the Pennsylvania Fair Trade Act;"** (Boldface supplied). Paragraph six: "* * * Provided retailer shall before offering any of such commodities for sale, at prices less than the stipulated retail price, first offer to sell such commodities to Producer at the current wholesale price then prevailing for such commodities in the State of Pennsylvania."

The fair intention to be derived from the language of the contract is that:

1. It is between parties distributing and retailing **within the State of Pennsylvania,** and

2. It invokes the protection of the Pennsylvania Fair Trade Act, and

3. It does not invoke the protection, or is it based upon the law of any other state, and

4. It contemplates sales within the state of Pennsylvania, i. e., intrastate transactions, and

5. It does not purport to apply to retail sales or any other transactions in other states or in foreign countries.

With respect to the retailers who entered into these contracts, and signed them, there is no mention of sales made by such retailers outside of Pennsylvania, nor are such sales mentioned or contemplated in these contracts. Nor is there anything in the Pennsylvania statute or in the Miller-Tydings Amendment which would supply these terms in petitioner's contracts. **Neither of these enactments, read in the most liberal spirit, makes a contract for the parties. They only save from the invalidity which would otherwise result from their price-fixing features, the contracts the parties themselves have made.** Whatever may be the permitted power to make contracts covering retail sale transactions outside of Pennsylvania, as well as within Pennsylvania, such contracts were not made in this case. Nor was it necessary. The retailers concerned conduct local stores and sell to their communities in purely intrastate sales transactions. The protection contemplated, which is in accord with the purpose of the Fair Trade Act, is against other local shopkeepers who by "loss-leader" practices might prey upon this local patronage. Sales into other states by these local retailers is not at all within the normal course of such intrastate business and naturally was not within the contemplation of the parties.

And yet, notwithstanding these contracts were not made to apply to interstate sales by contracting and signing retailers, petitioner contended that they do apply to the interstate selling and advertising transactions of non-signing and non-contracting parties like the respondent. As if it were not enough that non-signing retailer is bound to the contract terms of strang-

ers equally with the parties thereto, petitioner maintains that the non-signer is to be bound beyond that point to terms the strangers did not even agree to.

---

2. Scope of the Pennsylvania Act before the Miller-Tydings Amendment.

Of course, respondent, not being a party to the contracts, is bound to observe the prices therein only to the extent provided by the section of the Pennsylvania Fair Trade Act. It is to be emphasized that **petitioner is proceeding and relying on that section of the Pennsylvania Act alone and under the act of no other state or states.** Respondent was sent a Pennsylvania contract form, which does not deal with interstate sales but embraces sales "within Pennsylvania", and is specifically stated therein to be "under the Pennsylvania Fair Trade Act" alone, and this suit has been brought under that act alone. Leaving to one side for the moment the effect of the Miller-Tydings Amendment on the Pennsylvania act and supposing that the absence of coverage in the contract does not eliminate respondent's sales in other states from the coverage of the Pennsylvania statute, the act itself (aside from its purpose as declared above to be to prevent local, intrastate loss-leader selling) cannot be made to prohibit sales into other states below an established price. A state cannot lawfully prohibit the sale either to or from another state of a commodity below an established price. **Bowman v. Chicago & N. W. Railway Co.,** 125 U.S. 465, 8 S. Ct. 689; **Leisy v. Hardin,** 135 U.S.

100, 10 S. Ct. 681; **Cheney Bros. Co. v. Mass.**, 246 U.S. 147, 38 S. Ct. 295; **Alpha Portland Cement Co. v. Mass.**, 268 U.S. 203, 45 S. Ct. 477; **Whitfield v. State of Ohio**, 297 U.S. 431, 56 S. Ct. 532; **Rhodes v. State of Ohio**, 170 U.S. 412, 18 S. Ct. 664.

Likewise, a state cannot lawfully prohibit the circulation of advertisements within its borders in a periodical published outside the state and circulating throughout many states, interfering with the placing of such advertising by one engaged in interstate commerce, where the article advertised is not malum in se, but is regulated by the state. **Post Printing & Pub. Co. v. Brewster**, 246 Fed. 321; **State v. Salt Lake Tribune Pub. Co.**, 68 Utah 187, 249 Pac. 474 (48 A.L.R. 553); **Star-Chronicle Pub. Co. v. United Press Assoc.**, 122 C.C.A. 489, 204 Fed. 217.

The language of the Miller-Tydings Amendment thus describes the base of applicability of the state acts from which it makes the extension we shall define later, as follows:

> (Fair trade contracts are exempted from the Sherman Act) "when contracts or agreements of that description are lawful **as applied to intrastate transactions** under any statute * * * in any State * * *."
>
> (Boldface ours)

The highest court in California, affirmed by the highest court of the United States, stated that while the California Fair Trade Act might conceivably be construed to embrace interstate transactions, it would be construed as applying only to intrastate trans-

actions and to commodities confined to intrastate commerce to uphold its validity in the face of the contention that it attempted to regulate interstate commerce. **Max Factor and Co. v. Kunsman,** 5 Cal. (2d) 446, 467, 55 P. (2d) 177, aff'd 299 U.S. 198, 57 S. Ct. 147 (1936). The California court stated:

> "Although the terms of the statute are broad, and could conceivably be interpreted to include interstate transactions, we must necessarily construe the act as applying only to transactions within the state, that being the sole territorial extent of the legislature's powers."
>
> **(California Adjustment Co. v. Atchison, T. & S. F. Ry. Co.,** 179 Cal. 140, 175 Pac. 682, 13 A.L.R. 274; **American Banana Co. v. United Fruit Co.,** 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047.)

Petitioner saw the impossible nature of a contention that a contract of sale which is transacted in another state should be subject to the law of Pennsylvania, and resorted below to obviously bad law to relieve its plight. It contended that an advertisement is an offer to sell, and that the contract of sale is completed upon writing to the one advertising and accepting it. This proposition, if there were authority for it, would make all of respondent's sales occur within the state of Pennsylvania, and would subject them to the Pennsylvania statute. But it just isn't so. Conceivably, an advertisement **could be** worded so as to constitute an offer, but that is not our case. See

Restatement of Law of Contracts, § 25, and illustrations thereunder.

However, petitioner did not rely too heavily upon its position that the contracts of respondent were intrastate transactions and subject to Pennsylvania laws. Petitioner argued:

> "However, the intent of the Miller-Tydings Amendment to the Sherman Act was to make such agreements valid in both interstate and intrastate transactions so long as the state where the sale takes place has a fair trade law." (Plaintiff's Brief sur Motion for Summary Judgment, p. 25).

In support of that contention it cited one case decided in Louisiana: **Pepsodent Co. v. Krauss Co.,** 56 F. Supp. 922. The real issue in that case was, however, stated by the court as follows:

> "And defendant contends that the mere fact that Congress has removed the prohibition against combinations in restraint of trade in so far as the parties to a fair trade contract are concerned is not evidence of the fact that it intended to make resale price maintenance enforceable against retailers such as defendants who would not enter into such contracts.
>
> "Plaintiff on the other hand contends that the legislative history of the Miller-Tydings amendment makes it clear that **Congress intended to leave each state free to deal in its own discretion with the problem of resale price maintenance and not to leave that subject in the same locality governed in a hybrid fashion by local law as to the**

activities of contracting retailers and by federal law as to the competing activities of non-contracting retailers."

(Boldface ours)

The court upheld the latter position, and found that the non-signer provision of the state law was intended by Congress to be excepted from illegality under the Sherman Act by the Miller-Tydings Amendment, and was therefore not in conflict with the Sherman Act. In other words, Congress by the amendment, legalized the application under state law of fair trade contracts to non-signers as well as to signers.

But that is not at all the issue here. To say that the application of the state law to "competing activities in the same locality" of non-signers is excepted from illegality under the Sherman Act by the amendment, as well as the application of the state law to the activities of the contracting parties is one thing: it is something else entirely to say that the amendment extends the terms of a fair trade contract beyond the language and contemplation of the parties, and extends the application of the law (with reference to non-signers) of one state beyond the limits of that application as they existed before the amendment. The court's holding that the two were coextensive within pre-established limits, does not mean that either one is extended indefinitely beyond those limits. Yet petitioner contends that the Pennsylvania statute applies to respondent's advertisements circulated in periodicals in all the other 47 states and in foreign countries; that it applies to shipments into other states and countries under contracts transacted in those other

states and countries. If the Pennsylvania statute did not apply to such transactions before the amendment, it can apply to them since that amendment only by an extension effected by the amendment in one or both ways, that is (a) the amendment extended the statute of a state to this degree, or (b) the amendment itself constitutes a substantive enactment (a federal fair trade law) which is itself such an extension of the state law. Actually, neither one was intended by Congress, as the history of the amendment (including that cited in the Pepsodent case) clearly demonstrates.

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3. Is the Miller-Tydings Amendment a Federal Fair Trade Act?

It is clear that prior to passage of the Miller-Tydings Amendment to the Sherman Act, resale price maintenance contracts, such as the ones in Exhibit A of the complaint, were illegal under Section 1 of the Sherman Act, which read:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."
>
> 15 USCA § 1.
>
> **Dr. Miles Medical Company v. John D. Park & Sons Company**, 220 U.S. 373, 31 S. Ct. 376;

John D. Park and Sons v. Hartman, 153 Fed. 24, cert. den. 212 U.S. 588;

Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 S. Ct. 412;

Ford Motor Co. v. Union Motor Sales Co., 156 C.C.A. 584, 244 Fed. 156;

Chicago Flexible Shaft Co. v. Katz Drug Co. (D.C. 1934), 6 F. Supp. 193, appeal dismissed in C.C.A. 3, 1934, 72 F. (2d) 548;

Katz Drug Co. v. W. A. Sheaffer Pen Co., (D.C. 1933) 6 F. Supp. 212.

The first state law legalizing resale price fixing contracts was passed by the state of California in 1933. By 1936 there were twelve such state statutes (Senate Report No. 879, 75th Congress, recommending enactment of Miller-Tydings Amendment). In that year the Supreme Court of the United States, as then constituted, upheld by Mr. Justice Sutherland, the constitutionality of these statutes in the Seagram case and others cited in plaintiff's brief.

The constitutionality of the state acts being thus decided as to intrastate transactions, the momentum of the retailers' lobbies, and especially of the Retail Druggists' Association, enacted fair trade laws in many more states during the year prior to the Miller-Tydings Amendment. **(Bristol-Myers Co. v. Lit Brothers, Inc. (No. 1),** 33 D. & C. 52, 63, 67).

But there was one fly remaining in the druggists' ointment which is stated thus in Senate Report No. 879, supra:

"Though there is no specific adjudication on the subject, it is believed that contracts stipulating minimum **resale** prices, even when they are made or are to be performed in a state where such contracts are lawful, may violate the Sherman Act whenever the goods **sold** under the contract move in interstate commerce.

"Consequently many manufacturers not domiciled in the state of the vendee are not willing to run the risk of violating the Federal law, and the effectiveness of the state fair trade laws is thereby seriously impaired."

(Boldface ours)

Here, then, was the situation Congress was seeking to remedy by the amendment. It was simply the doubt as to the legality under the Sherman Act of contracts of **sale** specifying **resale** prices between a manufacturer in one state and retailers in another state, which involved the shipment of the goods **sold** from the state of the manufacturer to the state of the retailer for resale in the latter state, which shipment would be in interstate commerce, and therefore subject to the Sherman Act.

This situation, as set forth by the framers of the amendment, certainly called for no extension of the law of any state to resale transactions and advertisements taking place in other states; nor for the enactment of a federal trade law which would constitute such an extension of the state law.

The authors of the Miller-Tydings Amendment in their Report (supra) have made it as clear as the

English language is capable of being, that it was not their intention to draft a federal fair trade act:

> "In recommending the passage of S.3822, the committee, while fully recognizing the evils of loss-leader selling, is not required to determine the effectiveness of the device adopted by the States to eliminate the same * * *.
>
> "The Congress is not called upon to pass upon the effectiveness of the remedy, but should not put obstacles in the way of efforts of the individual States to make the remedy effective."

The committee then sets forth what the obstacles were:

> "Though there is no specific adjudication on the subject, it is believed that contracts stipulating minimum resale prices, even when they are made or are to be performed in a State where such contracts are lawful, may violate the Sherman Act whenever the goods sold under the contract move in interstate commerce.
>
> "Consequently, many manufacturers not domiciled in the state of the vendee are unwilling to run the risk of violating the Federal law, and the effectiveness of the State fair-trade laws is thereby seriously impaired."

The Committee goes on to state that the Miller-Tydings Amendment was designed to remove the Sherman Act as an obstacle in this doubtful situation:

> "S.100 removes the doubt as to the applicability of the Sherman Act by expressly legalizing such contracts where legal under the laws of the

state where made or where they are to be performed."

This is definitely not an expression of intention that the amendment is to be a federal fair trade act, itself taking up where the state acts leave off and regulating resale price maintenance. The purpose is simply **to remove the Sherman Act as an obstacle to the state acts in the situation set forth.**

The Committee several times repeats this purpose, and unmistakably declares that in enacting the amendment Congress is not called upon to pass upon the merits of the state statutes, and is not establishing a national policy on fair trade:

> "But most important from the standpoint of the Congress, the proposed bill merely permits the individual states to function, without Federal restraint, within their proper sphere, **and does not commit the Congress to a national policy on the subject matter of the State laws.**"
>
> (Boldface ours)

In the debate on the amendment on the Senate floor, **Senator Austin** (who sat on several committees which considered prior versions of the Miller-Tydings Act which failed to be enacted as independent bills) echoes the same denial that the amendment is an expression of Congressional policy for the nation, i.e., a federal fair trade act:

> "* * * Here is a measure which recognizes our form of government. Here is a measure which says 'We will not go into the State of Vermont with a regulation of prices from any other state

in the Union or from Washington, unless the State of Vermont is willing to have it done.' It is that freedom which is left by this measure and expressly sanctioned by it—that freedom of every State in the Union to declare its own policy with respect to its own domestic affairs which appeals to me most strongly."

(Congressional Record, Vol. 81, Part 7, p. 7496.)

And in the same debate, Mr. Tydings himself stated:

"What we have attempted to do is what 42 states have already written on their statute books. It is simply to back up those acts, that is all; to have a code of fair trade practices written not by a national board such as the N.R.A., but by each state so that the people may go to the State legislature and correct immediately any abuses that may develop. **We are trying to decentralize fair trade practices rather than to have the matter dealt with under the old N.R.A., which tried to put one blanket over the whole country** * * *."

(Boldface ours)

The above quotations argue for themselves. In the face of them it is indeed vain to argue that Congress adopted any positive fair trade law or policy which would apply to interstate commerce as an extension to the state fair trade acts. Its declaration in the amendment is rather a negative one, i.e., the Sherman Act does not apply, and that obstacle is removed in the situation specified, i.e., in the shipment from manufacturer to retailer.

4. Does the Miller-Tydings Amendment extend the State Acts to cover transactions in other States?

Nor does the amendment extend the area of application of the state laws to resale transactions and advertisements taking place in other states and foreign countries. The quotations already made in this brief from the Committee Report and the debate on the Senate floor are enough to establish this point. First, when it was denied that Congress was passing on the merits or effectiveness of the state laws, or establishing any policy either for or against resale price maintenance, that denial must mean that Congress was not by the amendment either setting up a federal trade law to control in interstate commerce, or permitting any one state to do so. To do either one would require an expression of policy by Congress on the subject, otherwise the act of Congress is capricious and arbitrary, and unconstitutional, which is not to be presumed.

Second, there are numerous indications in the amendment, report and debate that the area of applicability of the state statutes contemplated by Congress was intrastate transactions. The amendment itself, as previously pointed out, exempts contracts from the Sherman Act "when contracts or agreements of that description are lawful as **applied to intrastate transactions** under any statute * * * in any state * * *." As already indicated, the report states the purpose of the state acts to be to eliminate "loss leader" retailing, a purely local form of predatory competition which arose during the depression and prompted the state

acts. To prevent a cut rate store in Philadelphia from luring the customers from, and eliminating the competition of, another drug store across the street, or across town by engaging in "loss leader" selling, would not require the prevention of a man in a room over the cut rate store, of whose presence the customers below were not even aware, from mailing the same articles to customers outside the state entirely. How can these sales of the latter injure anyone of the above parties? We are not now speaking of his advertisements in Philadelphia or Pennsylvania, nor sales there, but only those transacted outside the state. When Congress contemplated "loss leader" practices, it contemplated a local practice, and a preventive of local application. Again the report contemplates intrastate application of state laws when it states:

> "But most important, from the standpoint of the Congress, the proposed bill merely permits the individual states to function, without Federal restraint, **within their proper sphere,** and does not commit Congress to a national policy on the subject matter of the state laws."
>
> (Boldface supplied)

And to repeat Senator Austin's statement in debate " * * * that freedom of every state in the Union to declare its own policy with respect to its own domestic affairs which appeals to me most strongly." The "proper sphere", "its own domestic affairs", "intrastate transactions"—these are not terms which suggest an intent to silently broaden the applicability of the laws of any one state to cover transactions occurring

outside the state, and carried on entirely by means of the United States mails.

Third, the report and debate demonstrates that there was no intention to broaden this area of application of the state law. As interpreted for us by these records, there is not one word in the amendment which would permit the Pennsylvania statute to apply to resale transactions made in other states. The clear meaning of the amendment is to the exact contrary:

> (Section 1 of the Sherman Act shall not render illegal) "contracts or agreements prescribing minimum prices for the resale of a commodity * * * when contracts or agreements of that description are lawful as applied to intrastate transactions, **under any statute * * * now * * * in effect in any State * * * in which such resale is to be made or to which the commodity is to be transported for such resale * * *.**"
>
> (Boldface ours)

It is plainly the law of the state **where resale is made, or to which the commodity is transported for resale** which determines whether the contract is lawful as applied to intrastate transactions within its borders, and consequently whether it is exempted from illegality under the Sherman Act. In other words, when respondent's resale and shipment for resale of petitioner's product is made in Vermont or Missouri or Texas or Florida or the District of Columbia or Mississippi or New York or Ohio, it is the law of that state which determines the legality of the transaction and not the State of Pennsylvania. If the law of either

state is extended in any way by the amendment (which we do not concede), it is the law of those states and not of Pennsylvania, which apply to the respondent. There is no authority for the opposing position, including the Pepsodent case. There is no statement in that case as to how the defendant was engaged in interstate commerce, but it is indicated that it must have been by reselling into the state of Louisiana, since the contention of plaintiff was upheld that Congress did not intend

> "to leave that subject **in the same locality** governed, in a hybrid fashion, by local law as to the activities of contracting retailers and by federal law as to the **competing** activities of non-contracting retailers".
>
> (Boldface ours)

Interstate commerce includes transactions into, as well as out of, a state. It is our contention that if the amendment did extend the law of any state over non-signers engaged in interstate commerce, it was the law of the only state which could say that the resale took place within its borders and was therefore the state in which the resale was made or into which the article was shipped for such resale.

If the rule were as the petitioner contends, i.e., that the Pennsylvania statute on which it bases its suit exclusively, governs sales made in all other states, then the very feature of the freedom of each of those other states to adopt its own laws and policy, which the committee emphasized and which appealed so strongly to Congress, is denied. Nor is this a mere theoretical encroachment upon the jurisdiction of the other states.

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The fair trade laws in the various states differ in a number of essential particulars, which would under the corporation's thesis, be in conflict. In 24 states the statutes provide that a person other than the owner of the trade mark may establish the prices; in 24 any other person may not. In 42 states a non-contracting retailer must abide by the prices; in 6 he need not. In 16 states the statutes authorize a minimum resale price; in 26 an absolute price is required. In 29 states sales are not exempted from the operation of the statutes when the trade mark or name is obliterated; in 13 they are. Wisconsin does not exempt sales made under order of court; the others having statutes do so. There are many differences in requirements among the state acts as to notice to the public, and to the distributor, and whether or not an opportunity must be given the distributor to repurchase the stock in the hands of a retailer, before the retailer may hold a closing-out sale. Four states never had fair trade acts, and in one the act was declared unconstitutional last year. (See tables setting forth the above provisions by states in 2 CCH "Trade Regulation Service" 7011-7013). Furthermore, the Miller-Tydings Amendment gives effect to future state fair trade acts of undetermined content when it states: "* * * under any statute, law, or public policy now or **hereafter in effect** in any state * * *." In view of this provision, it is impossible to predict how the areas of divergence and conflict in the state laws will be multiplied. It is unlikely, to say the least, that Congress intended to extend the present and future acts of any one state with all the then-existing differences known to Congress and of varying degrees of

conflict from state to state, into the jurisdictions of all other states. At any rate, if it did so, it was guilty of the purest hypocrisy when it declared its purpose to be to leave each state free to determine its own laws within its own sphere and to control its own domestic affairs.

In 2 C.C.H. Trade Reg. Ser. 7982, it is said:

> "Even when the **contracting dealer** is engaged in interstate selling, the legality of the contract rests with the law of the state in which the resales are made. The question becomes one of fact as to where the sales were made. The rule may be generally stated that the sale is made at the place where the title passes, or where the last act necessary to complete the contract of sale is performed."

At page 7117 the opinion is expressed:

> "**Non-contracting dealers,** not being under a contractual liability, are forced to maintain established prices only if they are subject to state statutory prohibitions. It seems that interstate sales should not be held subject to the prohibitions of any state law."

(Boldface ours)

Our position coincides with the above opinion, that is, that the Miller-Tydings Amendment made no extension of the laws of any state; and that assuming, arguendo, that it did extend the laws of any state, it was the law of the state where the resale is made, or where the goods are transported for such resale.

The New York Supreme Court has decided that the state within which the final resale is made is the one which has jurisdiction over the transaction and may control it by Fair Trade Law, according to the meaning of the Miller-Tydings Amendment. **Calamia v. Goldsmith Bros., Inc.,** 82 N. Y. Supp. 2nd 277.

An opinion of the Attorney General of the State of New York premises this same conclusion. It is his opinion that the Fair Trade Law of New York expressly exempts sales to the state government from the application of any agreement restricting resale prices. Since the Federal law (Miller-Tydings Amendment) sanctions price fixing agreements in interstate commerce only where permissible in the state of resale, it follows, in his opinion, that an attempt to fix prices on sales to the state would also violate the Federal antitrust laws and be unenforceable.

Opinion of the Attorney General of New York, November 14, 1949 (C.C.H. Trade Cases 1948-1949, Paragraph 62, 516).

The court is not now confronted with a contract which might have been made to apply to transactions in other states, or with a suit founded on the laws of the states and countries where resales were made and to which the goods were shipped for resale. The corporation stands on the Pennsylvania statute alone, and on that of no other state, and demanded a "sweeping injunction" (against sales and advertisements of respondent in all states and in other nations) against these transactions of respondent, which it alleges are violations of the law of Pennsylvania. This contention can not be sustained.

B.

Petitioner argues for judicial extension of scope of Miller-Tydings Amendment and fair trade laws.

If, as petitioner contends, the state fair trade laws, construed according to their manifest purpose, are not fully in accord with economic reality, which is not admitted, petitioner's forum is Congress, and not this Court. Certainly, it should not seek to lead this Court to a decision directly contrary to the intention of Congress, as set forth in the Amendment itself, in Committee and on the floor of the United States Senate. Thus, if a national fair trade act is needed and desired, let it be one uniform act enacted by Congress covering all interstate transactions, and not by judicial extension of the statute of any one state into all other states and foreign countries.

The Circuit Court clearly saw the conflicts which would result from incursions into all other states with the Act of one state.

It must be recognized, of course, that there is no unanimity of opinion in support of Petitioner as to the economic value or desirability of resale price maintenance. The Federal Trade Commission in the Commission's Summary and Conclusion on Resale Price Maintenance, 1945, concluded:

> "The Commission believes that the consumer is not only entitled to competition between rival products but to competition between dealers of a single product."

Furthermore, not all of the states have enacted fair trade laws, and the recent decision of the Florida Supreme Court in **Liquor Stores, Inc. and Webb City, Inc. v. Continental Distilling Corp.**, 40 So. (2d) 371, Fla. (1949) the court attacks the very philosophy behind such laws, pointing out that the laws were conceived under an entirely different set of economic circumstances from the normal ones which now prevail.

The Florida court found the act not to be within the scope of the state's police powers because it constituted an unjustifiable denial of the right to own and enjoy property, and because it extended the sovereign power of the state to one economic group, i.e., manufacturers, to the detriment of all other citizens, thereby constituting a violation of the due process clause of the state constitution. In connection with this point, Adams, C. J., finds that the question may no longer "be regarded as fairly open to differences of opinion", as was said in the Seagram opinion, **Old Dearborn Distributing Co. v. Seagram's Distillers' Corp.**, 299 U. S. 183, 196, 57 S. Ct. 139.

> "Many of the precedents from other jurisdictions on similar acts were made upon the proponents' statement that the general welfare would be served. The exact contrary is now perfectly apparent as will appear from a study of Summary and Conclusion of the Federal Trade Commission, December 13, 1946. (P. 375)
>
> "It is also well to note that when this type of law was first promulgated its purpose was to protect long established brands which had acquired

a substantial value. As time passed and one court after another approved them, perhaps because another court had, little if any inquiry was made of the original purpose. Now new brands by the thousands are created overnight to get the advantage of the act. It is well to remember also that this act applies to every kind of article including such necessities as food and drugs. In that connection it is enlightening to read fully the Summary of the Federal Trade Commission relative to the means employed by certain retail groups to coerce the manufacturers to fix prices for the retailer's benefit and to the detriment of both the manufacturer and the consuming public."

And Hobson, J., declared, in a concurring opinion:

"The validity of such legislation can be founded only upon, what was termed in the ancient days of the Roman Empire, the summum bonum—the greatest good for the greatest number—and what we now call general welfare. It is solely upon such premise that a legislative enactment, which is flagrantly violative of the established law of contracts, which destroy initiative on the part of the retail merchant and affects adversely the economic life of the common man and which portrays monopolistic, if indeed they are not communistic, tendencies, can be sustained. Under normal conditions such legislation is not consonant without philosophy and fundamental principles of government as I understand that philosophy and those principles. It is not truly a 'Fair' Trade Act so

far as its effect upon the consuming public is concerned, but actually it is 'unfair' and unconstitutional."

From the vantage point of many years of actual experience under these laws, there does not exist any room for "differences of opinion." As the Federal Trade Commission in its Summary and Conclusion on Resale Price Maintenance of 1945 states at page lix:

> "One of the principal arguments advanced for the legalization of resale price maintenance was that it was needed to enable manufacturers to control undesirable leader merchandising and 'sales below cost'. Proponents emphasized extreme price wars and the impression was created that before resale price maintenance became effective many nationally advertised brands were sold, especially by chain stores, and other large distributors, at or below invoice cost. In general, sales below invoice cost are exceptional. The records of chain stores, department stores, and super markets examined in the present inquiry indicate that although the average prices of such large distributors often were lower than those of independent stores before resale price maintenance became effective, those lower prices yield substantial gross margins over invoice cost of goods in all market areas visited * * *.
>
> "The 'sales below cost' argument yields itself to over-emphasis because it is indefinite in meaning unless 'cost' is fully defined. In the hands of strongly organized groups of retailers, resale price

maintenance fits well into plans to restrict price competition and enhance prices to levels yielding margins adequate to cover distribution costs desired by organized pressure groups * * *.

"The conclusion of the Department of Justice is that the actual effects of resale price maintenance have been those which are to be expected from private price fixing conspiracies unregulated by public authority, whether or not they enjoy the sanction of law. The department has further stated it to be its belief that if its Antitrust Division had sufficient men and money to examine every resale price maintenance contract written under State and Federal legislation, and to proceed in every case in which the arrangement goes beyond the authorizations of the Tydings-Miller Amendment, there would be practically no resale price maintenance contracts, and that in the absence of such wholesale law enforcement, the system of resale price legislation fosters restraints of trade such as Congress never intended to sanction * * *.

"The essence of resale price maintenance is control of price competition. Lack of adequate enforcement of antitrust laws leaves a broad field for the activities of organized trade groups to utilize it for their own advantage and to the detriment of consumers. The expenses of State and local fair trade committees, all of which are trade managed and trade financed, tend to increase or to prevent decreases in distribution costs. Manufacturers and dealers alike contribute to the ex-

pense of these committees for shoppers and investigators to obtain evidence of violations of prices and to pay lawyers employed by the committees in prosecution of cases * * *. The net result in enhancement and maintenance of high living costs is no less real because it is concealed in the prices at which goods reach the consumer in such a way that it is not subject to direct measurement."

Hobson, J., in his concurring opinion in the Florida opinion thus presents the viewpoint of the public:

"The very technical and finespun theory of vertical contracts as differentiated from those which are horizontal does not appeal to, satisfy nor indeed protect the average citizen. He does not appreciate nor understand why the interest of the consuming public, which group is comprised of a vast majority of our people, should be subservient to the property right of the individual owner of a trade-name, mark or brand. It appears to the writer that his reasoning is sound. Admitting the existence of such property right the welfare of the 'greatest number' should take precedence over that of a favored few if a choice must be made which will invade or infringe the constitutional guaranties of either group. The average citizen of whom I speak, the common man, if you please, believes in free enterprise, that 'competition is the life of trade', and that the principles of supply and demand and of building a 'better mouse-trap' have contributed in no small measure to making this Nation great."

Petitioner has presented to this Court a heart-rending picture of the calamitous position in which it now finds itself following the decree of the Circuit Court! But, if petitioner's contention that the law of the state of the residence of the retailer controls over those of all other states is accurate, then the respondent, and indeed any other enterprising mail-order business man, could operate without compliance with a fair trade law, selling into every state in the Union, by the simple expedient of conducting his mail-order business from the District of Columbia, Vermont, Missouri or Texas, where no fair trade laws have been enacted.

In fact, mail-order sales have not, and will not, destroy "equitably enforceable price structures." It is common knowledge that discount houses using an unlimited membership basis to circumvent the fair trade laws are flourishing, and retailers like the respondent are operating out of the non-fair trade law states. Yet, there seems to be enough "equitably enforceable price structure left to make it worth Petitioner's effort to carry this case to the nation's highest Court. The truth of the matter is that mail-order business is not a serious competitor of the local retail store business. In this connection it is well to note that Petitioner's statistics set forth on page 34 of its brief are somewhat weighted in its favor, for, in order to produce a figure of "one-fifth of all retail business, namely, $27,188,000,000", it included the sales of chain stores which are local stores dealing in intrastate sales so far as this case is concerned.

Petitioner has completely ignored the original purpose of the pertinent statutes and has predicated much

of its argument upon questionable economic theories which are advanced for the purpose of aiding the manufacturer, but not the public.

Our nation today is faced with the ever present threat of inflation, and great effort is now being exerted toward the urgent problem of holding down and rolling back prices. The fair trade laws have, for years, been an obstacle to such efforts, since their tendency must be to eliminate competitive pricing and to maintain abnormally high prices. We urge this Court to deny the petition before it and thereby refuse to lend encouragement to those who seek judicial extension of the scope of the Miller-Tydings Amendment and fair trade laws, which, as a matter of law and public policy, should not be construed to be broader in their application than originally intended by the Congress or state legislature respectively.

V.

CONCLUSION

For all of the foregoing reasons, respondent urges your Honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,
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Attorneys for Respondent.

April 2, 1951.

MAY 21 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 538

SUNBEAM CORPORATION, a Corporation.
Petitioner.

VS.

S. A. WENTLING,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable The Chief Justice and the Associated Justices of the Supreme Court of the United States:

Pursuant to permission granted by the Court on May 25, 1951, Sunbeam Corporation herewith submits this, its Supplemental Brief, in support of its Petition for a Writ of Certiorari to review a decision of the U. S. Court of Appeals for the Third Circuit which vacated a decree of the District Court of the United States.

Basis of application for leave to submit Supplemental Brief.

Since the Petition for Writ of Certiorari was submitted in this case, the Court has handed down its decision in the *Schwegmann Brothers, et al.* v. *Calvert Distillers Co.* and *Schwegmann Brothers, et al.* v. *Seagram Distillers Corp.*, respectively numbered 442 and 443—October Term 1950, ... U. S. .....; 19 U. S. Law Week 4301, thus bringing into existence additional considerations particularly affecting this case.

The *Schwegmann* decision, while approving "contractual" fair trade in interstate commerce, leaves unanswered certain considerations absolutely vital to fair trade. Since such considerations are involved in the instant case, those problems should be answered in the interests of setting at rest the present great commercial uncertainty as to the permissible scope of fair trade contracts and the lawful methods of protecting such contracts.

Indeed, during oral argument of the *Schwegmann* cases, counsel for both parties, in reply to questions from the Court, admitted that their cases presented different issues than the Sunbeam case.

ARGUMENT.

I.

The decision of this court in the Schwegmann case overrules that part of the decision of the Circuit Court of Appeals in this case holding that state fair trade acts would be unconstitutional if considered as affecting interstate commerce.

Respondent in this case advertised Petitioner's fair-traded products in national magazines. The District Court enjoined Respondent from violating Petitioner's fair trade contracts, particularly pointing out that:

> "This defendant did not advertise merely a razor for sale, he advertised a "Shavemaster" [Petitioner's registered trade-mark] electric razor. By so doing he has invaded a right that this plaintiff has been given by the Fair Trade Act of the Commonwealth of Pennsylvania in respect to a sale made under the terms of that Act and that trade-mark must be kept inviolate whether the sale is intrastate or interstate."

The Circuit Court reversed partially, and ordered that the Injunction be limited solely to intrastate transactions in Pennsylvania, on the ground that to give interstate application to the Pennsylvania Fair Trade Act, under the sanction of the Miller-Tydings Amendment, would be to give an unconstitutional effect to Miller-Tydings.

This Court has now, in the *Schwegmann* case, upheld the Miller-Tydings Amendment as permitting interstate application of *contracts and agreements* entered into under state fair trade laws. Therefore, to that extent, the decision of the Third Circuit Court of Appeals is erroneous and inconsistent with the decision of this Court, and must be reversed on that ground.

II.

Even though the Schwegmann case holds that a manufacturer may not compel a non-signer to be bound by its fair trade contracts, the manufacturer, as trade-mark owner, is not precluded from taking proper action to protect its trade-marks.

Petitioner's Complaint in the District Court, although not divided into separate counts, proceeded on two theories.

The principal theory of *Sunbeam's* case was to enjoin a continuing injury to its registered trade-marks "Sunbeam" and "Shavemaster". Petitioner's other theory rested on the non-signer provisions of the Pennsylvania Fair Trade Act.

Regardless that this Court has now held that the non-signer provisions do not apply in interstate commerce, there is not one word in the *Schwegmann* case which indicates that the vast body of law sustaining the right of the trade-mark owner to take all reasonable steps to protect his valuable property in such trade-marks and to prevent unauthorized use of his trade-marks has been impaired.

Judge Follmer of the District Court expressly recognized this aspect of Petitioner's case below, when he said:

> "This defendant did not advertise merely a razor for sale, he advertised a 'Shavemaster' electric razor."

Under the *Schwegmann* decision, if any non-contracting dealer somehow obtains the ownership of an article manufactured by Petitioner, he may resell it in interstate commerce if he sees fit and without regard to Petitioner's fair trade contracts. But we think it is going much further to say that in addition to such sale he may deliberately and

without permission advertise and use the trade-mark of Petitioner to accomplish his purpose.

By electing to merchandise under the fair trade system (which requires trade-marked goods as a basic condition) the manufacturer authorizes the retailer who enters into a fair trade contract to use his trade-mark (and the good will, national advertising, and the manufacturer's product guarantee that goes with it) as a principal aid in selling to the ultimate consumer. Conversely, by merchandising under a fair trade system, the manufacturer withholds permission to use his trade-mark from non-contracting dealers.

It is, therefore, respectfully submitted that, in the light of the *Schwegmann* decision, Respondent Wentling as a non-contracting dealer had only the right to advertise an "electric razor" and that he had no right, either by advertisement, correspondence or conversation, to use or invoke Petitioner's trade-marks "Sunbeam" or "Shavemaster" to aid him in making such sale.

If the Injunction of the District Court is to be modified, then the Injunction should be that Respondent Wentling may not in any manner in intrastate transactions within the State of Pennsylvania violate Petitioner's fair trade contracts, and as to transactions in interstate commerce, that he may not advertise Petitioner's trade-marks "Sunbeam" and "Shavemaster" nor offer to sell, or sell any of Petitioner's products which Respondent Wentling may come to own, without first obliterating or removing Petitioner's trade-marks from the products, and removing the products from cartons bearing Petitioner's trade-marks.

III.

Problems created by the Schwegmann decision.

After careful study of the opinion of the Court, it is most respectfully urged that, in addition to the previously specified grounds for the granting of the present Petition, it should be granted in order that the Court may, by its further opinion, expel the confusion and misunderstanding which have followed its holding in the *Schwegmann* case.

A. Resort to a state court, or to a federal court applying state law, for the protection of a right provided by a state statute is not conduct prohibited by the Sherman Act.

A particularly perplexing problem which, it seems to us, results from that holding is whether or not its effect is to preclude, as a violation of the Sherman Act, a non-resident trade-mark owner from resort to the court of a state for protection of rights afforded by state fair trade laws.

It is clear from the opinion in the *Schwegmann* case, that, under the Miller-Tydings Act, it is lawful for an out of state manufacturer or distributor to enter into fair trade contracts with vendees in those states which have fair trade statutes. It also appears to be clear from the same opinion that it would be lawful for such a manufacturer or distributor to go to court to enforce *the contracts* against violation by any such vendee.

But, to the full extent of the facts stated in the Schwegmann opinion, it would appear that such manufacturer or distributor, by the mere act of application to a state court of justice for redress against a non-signer of a wrong defined by state law (the unfair competition denominated in the non-signer clauses), would thereby suddenly be involved

in an "interstate marketing arrangement" declared in the opinion to be clearly illegal under the Sherman Act.

If this be the effect of the decision in the Schwegmann case, it seems to us that the reach and scope of the commerce clause have been so extended as literally to subject all intra-state commerce to control under the Sherman Act, regardless of what the law or public policy of a state may be. And, we believe, if such is the holding in the Schwegmann case, serious problems are precipitated with respect to the constitutional provisions assuring equal protection of the law. (Fourteenth Amendment, Section 1.)

That these consequences are involved follows, it seems to us, from a consideration of this Court's unanimous decision in *Old Dearborn Distributing Co.* v. *Seagram Distillers Corporation* (1936), 299 U. S. 183. There, sustaining the constitutionality under the federal constitution of the nonsigner clause of the Fair Trade Act of Illinois (and upon the same authority, that of the Fair Trade Act of California, in *Max Factor & Co.* v. *Kunsman* (1936), 299 U. S. 198), this court declared, in the concluding paragraph of its opinion, that:

> "The sole purpose of the present law [the Illinois Fair Trade Act] is to afford a legitimate remedy for an injury to the good will which results from use of trade-marks, brands, or names." (299 U. S. at 198.)

This purpose and effect of the fair trade statute was emphasized earlier in the same opinion when the Court pointed out that nothing in the Fair Trade Acts precludes:

> "the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end." (299 U. S. at 195).

Since, as we read the Schwegmann opinion, it is clear that fair trade contracts operative within states sanctioning them may lawfully be entered into by out of state trade-mark owners and since the clear implication of the opinion is that such contract rights may be enforced by the out of state trade-mark owner against the signing vendee, it is difficult to understand just how resort to a state court for protection against non-signers of rights growing out of that lawful conduct suddenly brings the Sherman Act into play to convict the out of state trade-mark owner and subject him to the serious penalties imposed by the Sherman Act.

May we define this a bit further? Broad as is the reach of the Sherman Act, a retail sale of a trade-marked product, out of stock held and owned by a corner druggist in a small city in the center of Pennsylvania—surely that retail sale alone is not interstate commerce. And surely it is within the power of the State of Pennsylvania, so far as the commerce clause of the federal constitution is concerned, to make reasonable regulations or provisions applicable to such sale.

The Legislature of the State of Pennsylvania has provided by its fair trade act that if such a sale is wilfully and knowingly made at less than the price stipulated in a contract executed under the sanction of the statute, it is actionable unfair competition. The highest court of the State of Pennsylvania, interpreting and applying the statute has found it reasonable, and referred to an antecedent decision of this Court in doing so (*Lentheric, Inc.* v. *F. W. Woolworth* (1940), 338 Pa. 523, 13 Atl. 2d 12).

Under these circumstances, the right of a local trade-mark owner within Pennsylvania to seek redress under the non-signer clause of the fair trade act of that State is surely

clear. And if all the commerce involved is local within Pennsylvania, such application to the Court could not conceivably constitute a violation of the Sherman Act. Yet, as we read the *Schwegmann* case, if a *non-resident* trademark owner, having made conceivably lawful contracts giving rise to the cause of action of unfair competition, should come to Pennsylvania and initiate such a suit within that State, the non-resident would be guilty of crime under the Sherman Act, merely because of the application to the state court (or to a federal District Court) for the equitable relief provided by the state statute. This, we submit, would result in denial of equal protection of the law.

It seems to us that this can hardly have been intended to be the result of the holding in the *Schwegmann* case; at the same time, so far as the facts are stated in the opinion of this Court in that case, it does appear to be the result.

B. The Schwegmann decision casts doubt upon common law and statutory remedies.

It would seem to us that neither the briefs nor the oral argument in the *Schwegmann* case brought to the consideration of the Court all of the materials involved, including the substantial body of case law which has developed, and the actual economic functioning of the fair trade laws. Without the benefit of such matters, the decision in the *Schwegmann* case is necessarily incomplete and has created more problems in an important segment of the commercial structure of this country than it has settled.

1. In upholding the Miller-Tydings Act, *as applied to contracts and agreements,* it must be assumed that the Congress intended useful contracts and agreements, but they can only be effective and useful if they can be enforced. It would be inequitable to and no court

would enforce the contract against a contracting retailer if his competitor may freely undersell him. The *Schwegmann* case says that such contracts cannot be enforced or protected by resort to the non-signer clauses of the law. The vital question then remains—To what other legal remedies may fair trade contracting parties resort in order to protect and enforce their contracts?

2. Does the *Schwegmann* case deprive the trade-mark owner of the common law remedy against tortious interference with contract relations by third parties?

3. Does the *Schwegmann* case deprive the trade-mark owner of the common law doctrine regarding equitable servitudes, which permits buyer and seller by contract and agreement to impose restrictions upon the property sold, which restrictions become binding upon subsequent non-contracting purchasers?

4. Does the *Schwegmann* decision permit a third party, without the consent or agreement of the trade-mark owner, to invoke and use such trade-mark for the purposes of his own gain and to the injury of the good will attached to such trade-mark?

5. Since for all practical purposes the overwhelming majority of sales of manufactured merchandise to the ultimate consumer in the United States involve, at some point or another, a movement in interstate commerce, does not the *Schwegmann* decision destroy the cooperative plan established between the federal Miller-Tydings Amendment and the state fair trade acts to establish a system under which such commerce may proceed in an orderly manner?

Fortunately, these questions are all presented by the instant case and it is of the utmost importance that those engaged in the vast portion of commerce built up in the manufacture and sale of nationally known and advertised standard brand merchandise know for a certainty what their rights and duties are under the law.

Such problems and considerations were heretofore considered by this Court and, as a matter of fact, were effec-

tively presented in the brief of Messrs. Rogers, Haves, Weigel & Loos on behalf of appellees in the case of *Max Factor & Co.* v. *Kunsman,* 299 U. S. 198. It would have been helpful to the *Schwegmann* case had these matters and the long established legal background therefor been again brought to the attention of the Court.

Conclusion.

It is, therefore, respectfully submitted that in the light of the decision of the *Schwegmann* case, the decision of the Third Circuit Court of Appeals in this case is not correct and should be reviewed; and we, further, most respectfully urge the granting of the present Petition in the interests of clarifying the situation so that the great numbers of individuals and businesses throughout the United States to whom the protection of trade-mark rights is important may be relieved of uncertainty with respect to the scope of what they may lawfully do for the preservation and protection of their symbols of good will.

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